FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 00-081375

Employee: Rick Sutberry

Employer: Trans World Airlines, Inc.

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Findings of Fact
The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact as to the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

Nature and extent of the primary injury
We note that the administrative law judge expressly relied on the opinions from Dr. Daniel Kitchens, who opined that the work injury resulted in nothing more than a temporary lumbar strain that resolved with no permanent disability; at the same time, however, the administrative law judge found that employee suffered a 7.5% permanent partial disability of the body as a whole referable to the low back as a result of the work injury. Implicit in the administrative law judge's finding that employee suffered permanent disability is a rejection of Dr. Kitchens' opinion regarding medical causation.

In any event, we find more persuasive the testimony from Dr. Raymond Cohen that the accident on July 17, 2000, caused an aggravation of employee's low back condition, and that it caused him to suffer a new injury and associated permanent partial disability. We adopt Dr. Cohen's findings with regard to the issue of medical causation. We also adopt the administrative law judge's finding that the work injury resulted in a 7.5% permanent partial disability of the body as a whole.

Preexisting conditions of ill
We find persuasive and adopt Dr. Cohen's opinion that, as of July 17, 2000, employee suffered a preexisting 5% permanent partial disability of the body as a whole referable to his preexisting spondylolisthesis, and a preexisting 15% permanent partial disability

of the body as a whole referable to employee's coronary artery disease. (We find less persuasive Dr. Schuman's competing opinion that employee did not suffer any functional disability or impairment referable to coronary artery disease prior to the primary injury.) We also find persuasive Dr. Cohen's opinion that employee's preexisting conditions of ill constituted hindrances or obstacles to employment.

Medical expenses

The parties stipulated that the cost of employee's past medical treatment, including his low back surgery, is $82,588.03. Employee argues that employer is liable for these expenses, relying on Dr. Cohen's testimony that employee's treatment was reasonable and necessary to cure and relieve the effects of the work injury. Employer, on the other hand, presents testimony from Dr. Kitchens, but Dr. Kitchens never provided an opinion whether employee's surgery was reasonably required to cure and relieve the effects of the work injury; instead, he opined that the worsening of employee's underlying preexisting condition is the substantial factor in the need for surgery. Dr. Kitchens' testimony thus fails to address the relevant statutory test. See *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011). It appears, therefore, that the only remaining question is whether Dr. Cohen's opinion applying the appropriate standard with regard to past medical expenses lacks credibility.

We acknowledge that employee suffered from a serious preexisting low back condition in the form of an L5-S1 spondylolisthesis, as well as the evidence demonstrating that employee initially experienced a good result from the conservative medical treatment he received following the work injury. But employer has failed to provide a competing medical expert opinion to explain why we should not rely on Dr. Cohen's opinion that employee's back surgery was reasonably required to cure and relieve the effects of the work injury. After careful consideration, we find Dr. Cohen's opinion on the issue to be persuasive. We find that employee's low back surgery was reasonably required to cure and relieve the effects of the work injury.

Dr. Cohen also opined that employee will need pain medications as a result of his work injury; Dr. Kitchens did not address the issue of future medical treatment. We find persuasive Dr. Cohen's findings and opinion as to the issue whether employee will need future medical care as a result of the work injury.

Temporary total disability

Following his low back injury, employee worked until about August 1, 2003. At the hearing before the administrative law judge, employee identified low back pain as the primary reason he left work on that date. At his deposition, however, employee identified both low back pain and heart problems as reasons for leaving work, and testified that his heart problems took precedence. When confronted with his deposition testimony, employee agreed that at that time he felt his heart problems were more important than his back in causing him to be off work.

We find that employee left work about August 1, 2003, because of back pain and heart problems. We find that employee's coronary artery disease took precedence in causing him to leave work. On September 23, 2003, employee saw Dr. Piper, who advised him

to consider a fusion surgery for his low back. But employee did not undergo surgery until October 23, 2006. Employee suggests that he was unable to undergo the recommended surgery until he obtained a clearance from his cardiologist, and requests a finding that he was temporarily and totally disabled from working due to his low back condition during the entire three year time period between Dr. Piper's surgical consultation and the procedure.

Dr. Cohen did not address the question of temporary total disability in either his report or his deposition. Neither of the vocational experts addressed the issue of temporary total disability. We have searched the medical records and we can find no indication that the reason for the delay in surgery was because employee needed a clearance from his cardiologist. Dr. Nordlicht's records from November 2003 and February 2004 demonstrate employee underwent myocardial imaging to rule out ischemia; there is no mention of a need for a surgical clearance. Dr. Piper's records from January 2004 indicate that surgery had been scheduled, but that it was cancelled after it was discovered that disability insurance wouldn't pay for the procedure. Dr. Santiago's January 21, 2005, treatment record reveals the doctor's preference that employee undergo a fusion surgery, but that employee wanted to try conservative treatment first; the record contains no mention of a cardiac clearance. Dr. Piper's records in September 2006 contain the doctor's second surgical recommendation, with no mention of any cardiac clearance, or of the intervening treatment employee received for his coronary artery disease.

Given the lack of any medical evidence in support, we find unpersuasive employee's testimony that his back surgery was delayed so that he could obtain a cardiac clearance. If employee expected to prove his entitlement to temporary total disability benefits for this three year period on the theory that he was prevented from obtaining needed treatment owing to his heart problems, he could have inquired of his experts on the issue.

Instead, we find the medical records to support a finding that employee was medically unable to work owing to his low back condition beginning with his fusion surgery on October 23, 2006. The parties stipulate that employee reached maximum medical improvement on August 14, 2007, the day Dr. Piper released employee from his care.

Permanent total disability

The vocational experts who testified in this matter agree as to the issue of permanent total disability. Stephen Dolan and Kimberly Gee each opined that employee is permanently and totally disabled as a result of the work injury in combination with employee's preexisting conditions of ill. Dr. Cohen also believes employee is permanently and totally disabled owing to a combination of his preexisting conditions of ill and the effects of the work injury. Dr. Kitchens did not address the issue of permanent total disability.

We modify the findings of the administrative law judge on this issue. We find most persuasive the expert opinions from Dr. Cohen, Mr. Dolan, and Ms. Gee that employee is permanently and totally disabled as a result of the work injury in combination with employee's preexisting conditions of ill.

Conclusions of Law

Medical causation

Section 287.020.2 RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

> An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.

We have found persuasive and adopted the testimony from Dr. Cohen that the work injury resulted in an aggravation of employee's lumbar spine condition and caused him to suffer a new injury and associated permanent partial disability. We conclude that the accident of July 17, 2000, was a substantial factor in causing the resulting medical condition and disability referable to employee's low back.

Past medical expenses

Section 287.140.1 RSMo provides, as follows:

> In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

The courts have made clear that "once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant." *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo. App. 2011)(citations omitted).

We have found persuasive and adopted Dr. Cohen's opinion that the medical care and treatment rendered to employee for his low back condition, including the fusion surgery, was reasonable and required to cure and relieve the effects of employee's work injury. Accordingly, we conclude employee is entitled to the stipulated amount of $82,588.03 in past medical expenses for treatment that was reasonably required to cure and relieve from the effects of the work injury.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ him during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Accordingly, we look to the evidence of employee's physical condition following the work injury.

We have rejected employee's argument that employer should pay temporary total disability benefits for the three years that elapsed between Dr. Piper's first surgical recommendation in September 2003 and the procedure in October 2006. We have found that employee failed to meet his burden of proving that his low back condition referable to the work injury rendered him unable to work during that time period.

We have found instead that employee was medically unable to work owing to his low back condition beginning with his lumbar fusion surgery on October 23, 2006. We conclude that, given employee's low back condition from October 23, 2006, through August 13, 2007, no employer in the usual course of business would reasonably be expected to employ him. We conclude employer is liable for 42 weeks of temporary total disability benefits at the stipulated rate of $599.96 per week, for a total of $25,198.32.

Future medical treatment

Dr. Cohen identified a need for future treatment referable to employee's low back injury consisting of pain medications. We have found the opinions of Dr. Cohen in this matter to be persuasive. We conclude that employer is obligated under § 287.140.1 RSMo to provide future medical treatments that may reasonably be required to cure and relieve from the effects of employee's work injury.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed…" *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

> [T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from preexisting permanent partially disabling cardiac and low back conditions at the time he sustained the work injury. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting cardiac and low back conditions had the potential to combine with a future work injury so as to cause a greater degree of disability than would have resulted in the absence of the conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found employee sustained a 7.5% permanent partial disability of the body as a whole as a result of the primary injury, and credited the expert opinions from Mr. Dolan, Ms. Gee, and Dr. Cohen that employee's permanent total disability results from a combination of his preexisting conditions of ill with the effects of the primary injury. We find that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

Given our findings, we conclude employee is permanently and totally disabled owing to the effects of his preexisting disabling conditions in combination with his permanent disability resulting from the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of medical causation, past medical expenses, future medical care, temporary total disability, permanent total disability, and the liability of the Second Injury Fund.

Employer is liable for past medical expenses in the amount of $82,588.03.

Employer is ordered to provide that future medical treatment that may reasonably be required to cure and relieve the effects of employee's injury.

Employer is liable for temporary total disability benefits in the amount of $25,198.32.

Beginning August 14, 2007, the date employee reached maximum medical improvement, the Second Injury Fund is liable for permanent total disability benefits at the differential rate of $285.70 for 30 weeks, and thereafter at the stipulated permanent total disability rate of $599.96 per week. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued December 17, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 17th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge denying employee's request for past medical expenses and temporary total disability benefits was correct, and should be affirmed.

After employee's accident on July 17, 2000, he received treatment at BarnesCare. There, he reported that he had no pain or numbness, no muscle weakness, and no paralysis in his legs. X-rays revealed Grade III spondylolisthesis at L5-S1. Treating doctors diagnosed a lumbar strain with significant underlying spondylolisthesis, and prescribed physical therapy.

Employee only attended one physical therapy session; the corresponding treatment note indicates that his low back complaints were a lot better than the day before. Employee returned to BarnesCare on July 26, 2000, and reported that his back was much improved and that he was nearly pain free. Employee's lumbar range of motion was intact with no guarding. Treating doctors opined that employee's lumbar strain was resolved, and released employee to return to work without restrictions. At the hearing before the administrative law judge, employee agreed that the BarnesCare records were accurate, and that his initial course of conservative treatment following the July 2000 accident relieved his low back pain.

Thereafter, employee continued to work his job for employer for several years without incident. Employee didn't seek any treatment for low back complaints until July 12, 2002, nearly two years after the work injury. On that date, employee told his primary care physician Dr. Radel that he had experienced the onset of right sided low back pain when he got up out of a chair. Employee also told the chiropractor Dr. Dean Weich that his low back pain resulted from jumping up quickly from a chair. Employee eventually saw a specialist, Dr. Piper, and underwent a two-level fusion surgery on October 23, 2006, more than *six years* after the work injury. Dr. Piper's post-operative diagnosis was chronic back pain with right greater than left radicular pain and Grade II-III L5-S1 lytic spondylolisthesis.

Employer provided the medical expert testimony of Dr. Daniel Kitchens, a board certified neurosurgeon. Dr. Kitchens explained that employee had a preexisting condition in the form of a bilateral pars defect at L5, and that this condition and its effects, rather than any result of the July 2000 lumbar strain, was the cause of employee's present low back complaints and his need for surgery in October 2006. Dr. Kitchens opined that the temporary lumbar strain in July 2000 was not a substantial factor in causing any worsening of employee's low back symptoms, or any permanent partial disability.

I disagree with the majority's choice to credit the opinions from Dr. Cohen in this matter over those provided by Dr. Kitchens. There is no indication in the records from employee's treating physicians that employee's recurrence of low back symptoms in July 2002 had anything to do with the July 2000 accident. Dr. Cohen failed to provide a convincing explanation for why the worsening of employee's symptoms in July 2002

should be seen as the product of a minor strain that occurred two years prior rather than a natural deterioration of employee's preexisting spondylolisthesis. Dr. Cohen is not a neurosurgeon, and he admitted that he based his causation opinion in this matter on a history that departed from that reflected in the medical records. I believe Dr. Cohen's conclusory opinion provides scant support for the majority's decision to assess liability against employer for employee's subsequent and unrelated treatment for the low back, including the 2006 surgery.

With respect to the issues of past medical expenses and temporary total disability, I believe Dr. Piper took employee off work and performed surgery to address a condition that had nothing to do with the July 2000 lumbar strain. Although Dr. Kitchens did not address the relevant statutory test for an award of past medical expenses, his credible medical causation opinion works the same effect. If the work injury is not a substantial factor in causing the worsening of employee's symptoms in 2002, it follows that employer cannot be held liable for the medical treatment employee underwent to address those symptoms, or for temporary total disability benefits during employee's recovery following surgery.

For the foregoing reasons, I would affirm the award of the administrative law judge concluding that employer is not liable to pay for employee's past medical expenses or temporary total disability benefits. I respectfully dissent from the majority's findings and conclusions as to these issues.

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James G. Avery, Jr., Member

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Rick Sutberry

Dependents: N/A

Employer: Trans World Airlines, Inc.

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: September 26, 2012

Injury No.: 00-081375

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: MDL

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 17, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was lifting a box when he heard a pop in his back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 7.5% PPD of the body as a whole referable to the low back
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? $471.00

17. Value necessary medical aid not furnished by employer/insurer? $82,588.03

18. Employee's average weekly wages: Unknown

19. Weekly compensation rate: $599.96/$314.26

20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	0
weeks of temporary total disability (or temporary partial disability)	0
30 weeks of permanent partial disability from Employer	$9,427.80

22. Second Injury Fund liability: No

TOTAL:	$9,427.80

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Dean L. Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rick Sutberry

Injury No.: 00-081375

Dependents: N/A

Employer: Trans World Airlines

Additional Party: Second Injury Fund

Insurer: Self-Insured

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: MDL

PRELIMINARIES

A hearing was held on September 26, 2012 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Rick Sutberry ("Claimant") was represented by Mr. Dean L. Christianson. Trans World Airlines ("Employer") which is self-insured was represented by Mr. Jason Caudill. The Second Injury Fund ("SIF") was represented by Assistant Attorney General Kristin Frasier. Mr. Christianson requested a fee of 25% of Claimant's award.

The parties stipulated that on or about July 17, 2000, Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; the appropriate rates of compensation are $599.96 for Total Disability benefits and $314.26 for Permanent Partial Disability ("PPD") benefits; Employer paid no Temporary Total Disability ("TTD") benefits; Employer paid medical benefits of $471.00; and Claimant reached Maximum Medical Improvement ("MMI") on August 14, 2007.

The issues for resolution by hearing are whether Claimant sustained an accident arising out of and in the course of employment on or about July 17, 2000; medical causation; liability of Employer for past medical benefits of $82,588.03; liability of Employer to provide future medical care; whether Employer is liable to Claimant for past TTD benefits from September 23, 2003 to August 13, 2007; what is the nature and extent of PPD Claimant sustained as a result of the accident of July 17, 2000; whether Claimant is permanently and totally disabled; and liability of the SIF.

Any markings on any of the evidence were present when received and were not placed thereon by the Administrative Law Judge.

All of the evidence submitted was reviewed, but only evidence necessary to support this award will be summarized.

SUMMARY OF EVIDENCE

Claimant was working for Employer on July 17, 2000 as a maintenance mechanic. Claimant was 47 years old at the time of his accident. Claimant was 59 years old at the time of the hearing. His job duties for Employer involved a variety of maintenance jobs including painting, changing light bulbs, and working on heating and air conditioners, among other things. Claimant last worked for Employer on August 3, 2003.

Prior to July 17, 2000, Claimant suffered from several injuries and illnesses. Beginning in 1986, Claimant began treating for a heart condition. Claimant underwent a cardiac catherization in July 1986. Claimant was hospitalized in 1990 for coronary artery disease, and underwent another catherization. Claimant injured his right shoulder in July 1997 and had some conservative treatment for his condition, including injections. Claimant had a right hand injury in 1996. He sustained an avulsion fracture of the right small finger and underwent surgery. Claimant injured his left knee in 1986 and 1995. On July 8, 2000, Claimant fell and broke his nose.

On July 17, 2000, Claimant was lifting a heavy shipping box to put a strap underneath. He was lifting the box with a co-worker, whose rope handle broke, causing Claimant to drop his end, at which time he felt a pop in his back. There was a barrel of oily rags in his way, and he might have slipped in oil.

Employer referred Claimant to BJC Corporate Health for treatment. Claimant's first appointment with BJC Corporate Health was on July 18, 2000. Claimant gave a history of slipping in oil and twisting his back. He reported feeling a pull in his right lower back and became progressively stiff. He stated he had no pain/numbness or paralysis in his legs or feet. X-rays were performed which revealed severe disc disease with Grade II spondylolisthesis, and bilateral pars defect. Claimant was prescribed medication and physical therapy and placed on light duty with restrictions of lifting to 15 pounds, and limit repetitive bending or twisting of the back. The diagnosis was lumbosacral strain with pre-existing L5-S1 spondylolisthesis. Claimant underwent one physical therapy session on July 19, 2000. The report indicated that Claimant had complaints of low back pain which were a lot better than the day before.

Claimant returned to BJC Corporate health again on July 26, 2000 at which time he reported his back was much improved, and he was nearly pain free. Upon physical examination he had no pain or tenderness on palpation of his lumbar spine, his range of motion was intact and he had no guarding. Claimant was released to full duty. The diagnosis was resolved lumbosacral strain and pre-existing L5-S1 spondylolisthesis.

Claimant did not seek medical treatment for his back for a year and one-half, and then began treating with his family physician. Claimant testified he was dealing with heart problems during that year and one-half. Claimant testified during that year and one-half he continued to work for Employer.

The next time Claimant saw a doctor for back problems was July 12, 2002, when he presented to his family physician with complaints of right sided low back pain for two days. He

stated the symptoms began when he was getting out of a chair. He denied any traveling pain, numbness, or tingling. He gave a history of frequent low back pain on an irregular basis, and reported the symptoms seemed to be occurring more frequently than in the past. Claimant was prescribed medications and told to follow up if his symptoms did not improve.

Claimant saw a chiropractor, Dr. Weich on August 13, 2002. At that time Claimant reported he was being seen for back and neck pain and that the condition began on July 1, 2002. Claimant reported he had problems with his neck and upper back, as well as his lower back going down his right leg and right side. Dr. Weich's handwritten records indicate Claimant reported an onset six weeks prior, when he jumped up quickly out of a chair and felt a pop and pain. Claimant reported a history of low back pain for about a year, and also indicated he had daily neck pain which had been present for a week. Claimant treated with Dr. Weich on four occasions, from August 14, 2002 through August 20, 2002.

Claimant stopped working for Employer in August 2003. Claimant testified he stopped working because of a combination of his back pain and his heart problems. He underwent a stent placement in his heart within a week after he stopped working.

Claimant began seeing Dr. Piper, a back specialist, on September 23, 2003. At Claimant's first visit to Dr. Piper's office on September 23, 2003, he signed a Patient Registration Form which indicated that he felt the injury was related to a job injury that occurred in September 2002. Claimant told Dr. Piper he had chronic back and right leg pain, and had been off work for 6 or 7 weeks. Dr. Piper noted that x-rays indicated Grade II-III L5-S1 spondylolisthesis. He opined that no conservative treatment would help Claimant's problem, and recommended decompressive laminectomy and fusion. Dr. Piper provided a report to Employer, dated September 23, 2003 stating Claimant's diagnosis was degenerative spondylolisthesis, and he recommended surgery. Dr. Piper indicated Claimant was unable to work and an estimated return to work date was unknown. Dr. Piper indicated Claimant had been seen for a non work related injury/illness. Claimant sought a second opinion from Dr. Grubb.

Claimant saw Dr. Grubb on February 23, 2004. Dr. Grubb's records reveal Claimant reported a two year history of increasingly severe pain in his low back and right leg. Claimant indicated he had stopped working for Employer in August 2003 because of back pain. Dr. Grubb diagnosed Claimant with Grade II spondylolisthesis L5 on S1. There was no spinal canal stenosis, and Dr. Grubb ordered an MRI of the lumbar spine. Claimant returned to Dr. Grubb on March 8, 2004, at which time Dr. Grubb reviewed a March 1, 2004 MRI of the lumbar spine, which showed Grade II spondylolisthesis at L5-S1 with severe associated degenerative disc disease. There was marked interspace narrowing at L5-S1 as well as bilateral L5-S1 foraminal stenosis. There were bilateral L5 pars interarticularis defects, as well as mild diffuse disc bulging at L4-5 with degenerative changes. There was also mild diffuse T11-T12 disc bulge with degenerative disc changes.

Claimant saw a third back surgeon, Dr. Santiago on November 2, 2004. Dr. Santiago reviewed Claimant's x-rays and diagnosed Claimant with L5-S1 spondylosis; L5-S1 spondylolisthesis; and right S1 radiculopathy. Dr. Santiago felt Claimant was a candidate for decompression and fusion, but wanted updated imaging studies. He also noted Claimant was at risk for non-union because of his smoking, and recommended that he cut back. Claimant

returned to Dr. Santiago on January 21, 2005, at which time it was noted Claimant needed to quit smoking. Dr. Santiago again discussed surgical treatment, but Claimant indicated that he was interested in trying other conservative measures to put off surgery as long as possible.

Claimant underwent a lumbar myelogram on January 7, 2005 which indicated Grade II L5-S1 anterolisthesis with moderate bilateral neural foraminal narrowing and a chronic bilateral pars defect and multi level minimal-mild disc bulges. He also had an MRI of the lumbar spine on July 29, 2005 which indicated bilateral L5 spondylosis with Grade II spondylolisthesis of L5 on S1, associated with severe degenerative disc disease, which was unchanged in comparison to prior study, and there was also mild degenerative disc changes at T10 through T12 and L4-5.

On October 23, 2006, Dr. Piper performed removal of a loose posterior arch at L5; decompressive lamiectomy with decompression of the L4, L5, and S1 nerve roots bilaterally; synthes pedicle screw instrumented posterolateral fusion L4-S1 utilizing BMP, as well as local autogenous bone. His post-operative diagnoses were chronic back pain with right greater than left radicular pain and Grade II-III L5-S lytic spondylolisthesis.

Following his surgery Claimant continued to follow up with Dr. Piper's office. On November 21, 2006, it was noted Claimant was doing very well and his symptoms had markedly improved. Claimant was a month post-op and had no shooting pains and reported his back felt good. Claimant returned to Dr. Piper on February 6, 2007, at which time it was noted that he had no leg pain and no back pain. Claimant was also seen on August 14, 2007, at which time it was noted that he was 10 months out from surgery and was doing extremely well. Claimant said that his leg pain was gone, and he was very satisfied and happy. Radiographs showed a complete solid fusion with good position of the screws, hardware and discs.

After his surgery in 2006 Claimant underwent physical therapy. In the physical therapists initial correspondence to Dr. Piper, dated November 27, 2006, it was noted that Claimant was 5 weeks post-lumbar fusion and had been on short term disability for 3 years secondary to having back surgery, as well as two cardiac stents placed. On the Excel Physical Therapy Intake Form dated November 27, 2006, Claimant indicated the injury was not accident related.

Dr. Raymond Cohen testified on behalf of Claimant. Dr. Cohen examined Claimant on September 6, 2005. Claimant gave Dr. Cohen a history of injuring his low back on July 17, 2000 while picking up a 150 pound crate with a co-worker. The co-worker dropped his part of the crate while Claimant was still holding his end, which caused a pop in Claimant's back. Claimant also reported he had right leg pain which persisted. Claimant also told Dr. Cohen he had some prior back strains over the years and had some prior pops for which he had seen a chiropractor.

Dr. Cohen diagnosed Claimant with an acute aggravation of L5-S1 grade II spondylolisthesis with right leg radiculopathy. At the time of his September 6, 2005 report, Dr. Cohen opined Claimant needed to see a spinal surgeon to consider surgery. Dr. Cohen testified that Claimant's spondylolisthesis did not develop suddenly and it takes many years for spondylolisthesis to develop. Because of the degenerative changes over many years, Claimant's nerve roots did not have a lot of room. Dr. Cohen felt that Claimant's history of an acute injury while lifting a crate caused a sudden aggravation of the degenerative process.

Dr. Cohen examined Claimant again on November 11, 2010. Claimant had undergone a fusion surgery with Dr. Piper on October 23, 2006. He testified that Claimant's surgery was reasonable and necessary and related to the July 17, 2000 work accident. He testified because of the fusion surgery, Claimant has 55% PPD of the spine related to the work injury. Dr. Cohen testified he did not review any treatment records for Claimant's back from July 26, 2000 through April 2002 before rendering his opinion in the September 6, 2005 report, and did not review any of the medical records of Dr. Weich, Claimant's chiropractor. Dr. Cohen also testified regarding Claimant's pre-existing conditions, and opined they were a hindrance or obstacle to employment or re-employment, and that Claimant was permanently and totally disabled as a result of the work injury in combination with those prior medical conditions.

Dr. Daniel Kitchens, a neurosurgeon who specializes in surgery of the spine, testified on behalf of Employer. Dr. Kitchens testified Claimant gave him a history of injury that was consistent with his trial testimony. Claimant told Dr. Kitchens his pain increased a couple of years after the accident and he began having pain into his right buttock and right leg. Claimant told Dr. Kitchens he eventually underwent a lumbar fusion with Dr. Piper, which led to resolution of the pain down his right leg. Dr. Kitchens noted Claimant's back pain improved. However, 6 to 8 months after the surgery Claimant began to develop pain into his left buttock and down his left leg. That pain continued and Claimant reported pain in his low back on a daily basis.

Dr. Kitchens reviewed the records of BJC Corporate Health. Dr. Kitchens testified Claimant was diagnosed with pre-existing spondylolisthesis, which is an offset of the vertebra, in Claimant's case, L5 on S1. That is a condition where L5 slips forward over S1. Dr. Kitchens also noted that Claimant had a bilateral pars defect at L5-S1. This was a developmental defect, typically occurring during a growth spurt in the teenage to late teenage years, resulting in the weakening of fibrous union between the back arch of the vertebra and the vertebral body in the region of the facet joint. In a normal situation, the pars is solid bone, but when there is a pars defect there is no solid bone and there is actually only fibrous tissues which connect the back arch of L5 to the vertebra. That allows for loosening or slippage of L5 on S1, which is the spondylolisthesis. Dr. Kitchens felt that Claimant's spondylolisthesis and pars defect were present prior to July 2000.

Dr. Kitchens also noted the records from BJC Corporate Health dated July 26, 2000, which indicated that Claimant's symptoms were much improved and he was nearly pain free. Dr. Kitchens noted that Claimant was given a diagnosis of resolved lumbosacral strain with pre-existing L5-S1 spondylolisthesis.

Dr. Kitchens testified he also reviewed the July 12, 2002 records where Claimant reported right-sided low back pain for two days that began when he was getting out of a char, and noted that he had frequent low back pain on an irregular basis. Dr. Kitchens also reviewed the August 13, 2002 record of Dr. Weich, who recorded that Claimant had onset of back pain six weeks prior when he jumped quickly out of a chair and felt a pop. Dr. Kitchens also reviewed the medical records of Dr. Grubb dated February 23, 2004, which indicated that Claimant had a two year history of increasingly severe back pain associated with right leg pain.

Dr. Kitchens testified his diagnosis of Claimant was Grade II spondylolisthesis at L5-S1, degenerative disc disease at L4-5 and L5-S1, and status post-posterior lumbar fusion by Dr. Piper on October 23, 2006. With respect to the July 17, 2000 work accident, Dr. Kitchens opined that Claimant sustained a musculoskeletal strain. He testified the spondylolisthesis was pre-existing from when Claimant was a teenager.

Dr. Kitchens testified the July 17, 2000 work incident was not a substantial factor in causing Claimant's lumbar spondylolisthesis. He did not believe that the July 17, 2000 work accident was a substantial factor in causing the worsening of Claimant's symptoms that began in 2002. Dr. Kitchens felt that the symptoms in 2000 were from a musculoskeletal strain which was short lived and resolved. He then had a second incident in 2002 which the medical records relate to him getting out of a chair. Dr. Kitchens opined those symptoms in 2002 were related to his spondylolisthesis. He did not feel that the work incident of July 17, 2000 was a substantial factor in the worsening of Claimant's symptoms in 2002 or the need for surgery by Dr. Piper in 2006. Dr. Kitchens did not find Claimant had any PPD as a result of his work activities or the work accident of July 17, 2000. He testified taking into account Claimant's overall back condition, he had 10% PPD of the body as a whole related to the spondylolisthesis which worsened and required surgery.

Mr. Stephen Dolan, a vocational rehabilitation counselor, testified on behalf of Claimant. Mr. Dolan testified Claimant was permanently and totally disabled as a result of the combination of the July 17, 2000 work injury and his prior medical conditions. Mr. Dolan testified Claimant told him he stopped working for Employer on July 17, 2000.

Kimberly Gee, a vocational expert, testified on behalf of Employer. Ms. Gee testified Claimant is permanently and totally disabled from a combination of pre-existing injuries and conditions combined with subsequent injuries and illnesses.

Dr. Stephen Schuman, who is board certified in internal medicine and cardiology, testified on behalf of the SIF. Dr. Schuman opined that Clamant did not have any cardiac disability prior to the July 17, 2000 work accident.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

ACCIDENT

Claimant sustained an accident on July 17, 2000 when he was lifting a box with his co-worker, when the co-worker lost his grip on the box, causing it to fall. Although there is a slight discrepancy in the medical records of BJC Corporate Health, which state that Claimant slipped on some oil, Claimant testified credibly that there were some oily rags, and he doesn't remember if he told the doctors about the oily rags. The difference in the medical records is slight, and I find Claimant's testimony credible regarding the accident and how it occurred.

MEDICAL CAUSATION

The July 17, 2000 work accident was not a substantial factor in causing and/or aggravating Claimant's spondylolisthesis and the need for the October 23, 2006 surgery with Dr. Piper. Claimant's need for surgery was caused by a degenerative condition related to a L5 pars defect and spondylolisthesis which existed prior to the work accident.

I find the testimony of Dr. Kitchens credible, and more persuasive than the testimony of Dr. Cohen. Dr. Kitchens opined that Claimant's work accident consisted of a musculoskeletal sprain which resolved. Claimant did not have any signs of radiculopathy at the time of the work accident, but developed radicular symptoms two years later.

Dr. Kitchen's testimony is supported by Claimant's medical records. Claimant treated with BJC Corporate health consisting of one physical therapy session, and was released 9 days after the accident to full duty with a diagnosis of resolved lumbar strain. Claimant did not receive any other medical treatment for his back until July 12, 2002, two years after the accident, at which time he reported injuring his back two days prior getting out of a chair.

Claimant sustained a lumbar strain injury on July 17, 2000, which resolved after minimal conservative treatment.

PERMANENT TOTAL DISABILITY

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). If the last injury standing alone did not cause the employee to become PTD, the inquiry turns to potential liability for PTD by Second Injury Fund. The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 *RSMo*. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). Further, §287.220.1 RSMo directs that the degree of disability be determined by "the degree or percentage of employee's disability that is attributable to all injuries or conditions existing *at the time the last injury was sustained*" (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as*

Custodian of Second Injury Fund, 916 S.W.2d 263 (Mo.App.1995) quoting *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993). With a claim for PTD benefits, Claimant must show that total disability preventing reasonable employment must be more than post-accident worsening of preexisting disabilities, and Claimant must show that a "worsening was caused or aggravated by the primary injury." *Michael v. Treasurer*, 334 S.W.3d 654, 665-66 (Mo.App. S.D. 2011).

Although vocational experts have found Claimant to be PTD, it is not a result of his work accident on July 17, 2000, or of a combination of his work accident and his preexisting injuries or illnesses. I find the medical opinion of Dr. Kitchens to be persuasive, that on the date of injury, July 17, 2000, Claimant had a preexisting condition in his low back that included spondylolisthesis, spondylosis, and pars defects. Dr. Kitchens opined Claimant's July 17, 2000 work injury produced a musculoskeletal strain that resolved in nine days, and Claimant returned to work for the next three years. In 2002 Claimant felt a pop in his back after arising from a chair (a non-work related incident), an incident Dr. Kitchens related to Claimant's preexisting spondylolisthesis. Dr. Kitchen opined Claimant's July 2000 work injury was not a substantial factor in worsening Claimant's low back condition, or the need for surgery performed by Dr. Piper in 2006. Dr. Kitchens' opinions are supported by the medical records placed in evidence. As I accept Dr. Kitchens' opinion, I find Claimant's July 17, 2000 musculoskeletal strain injury standing alone did not remove Claimant from the workforce, and Claimant failed in his burden to show that a worsening of his low back condition was caused or aggravated by the primary injury. Employer is not liable for PTD benefits.

Further, I also find SIF is not liable for PTD benefits. At the time of the July 2000 primary injury (a musculoskeletal strain), Claimant's preexisting conditions did not combine to create PTD as evidenced by Claimant testimony that he continued to work for Employer for the next three years. [1] SIF is not liable for PTD benefits.

PERMANENT PARTIAL DISABILITY

Claimant sustained 7.5% PPD of the body as a whole referable to the lumbar spine as a result of the July 17, 2000 work accident. Claimant suffered a musculoskeletal strain that resolved in 9 days. He returned to work full duty and continued to work for three years after the work accident.

CONCLUSION

Employer is responsible for PPD benefits representing 7.5% of the body as a whole referable to the lumbar spine. In light of the above findings of fact, the remaining issues are moot. Because the PPD awarded falls below threshold for SIF PPD benefits, and the SIF is not liable for PTD benefits, the claim against the SIF is denied.

[1] Additionally, Dr. Schuman testified on the date of the primary injury Claimant had no functional disability or impairment related to his heart condition.

This award is subject to an attorney's lien of 25% in favor of Claimant's attorney Mr. Dean L. Christianson.

Date: _____ Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation